

SERVED: July 16, 1993

NTSB Order No. EA-3929

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 2nd day of July, 1993

JOSEPH M. DEL BALZO,
Acting Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-9936

v.

MICHAEL LOUIS JOHNSON,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision¹ issued by Administrative Law Judge William A. Pope at the conclusion of an evidentiary hearing held in this case on March 19, 1991, upholding the Administrator's order revoking respondent's airline transport pilot certificate pursuant to 14

¹ Attached is an excerpt from the hearing transcript containing the oral initial decision.

C.F.R. 61.15 (a).² For the reasons discussed below, we deny respondent's appeal and affirm the initial decision.

The order of revocation, which served as the complaint in this proceeding, alleged as follows:

1 You are the holder of Airline Transport Pilot Certificate No. 255119278.

2 You were tried in the United States District Court of the Middle District Court of Alabama, and on July 23, 1987 were found guilty of the following charges:

a) . Violation of Title 21, Section 846, United States Code, (conspiracy to possess with intent to distribute a Schedule II controlled substance - Cocaine) .

b) Violation of Title 21, Section 963, United States Code, (conspiracy to import a Schedule II controlled substance - Cocaine).

c) . Violation of Title 18, Section 2, United States Code, (aiding and abetting).

3 Your conviction was affirmed in a decision by the United States Court of Appeals for the Eleventh Circuit on April 5, 1988.

In the initial decision, the law judge noted that respondent had been a part of a "major drug-trafficking scheme involving unlawful importation"* of more than 700 pounds of cocaine. (Tr. 203, 210.) He rejected respondent's testimony, essentially that

² Section 61.15 states, in pertinent part:

§61.15 Offenses involving alcohol or drugs.

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession? transportation? or importation of narcotic drugs, marihuana, or depressant or stimulant drugs is grounds for --

* * *

(2) Suspension or revocation of any certificate or rating issued under this part.

he had no role in the operation, finding that respondent's "protestations are not credible." (Tr. 204.) Although the law judge found the evidence insufficient to establish that respondent had been the co-pilot on the drug-carrying flight - which formed the basis for respondent's conviction, as the Administrator had attempted to prove at the hearing (Tr. 208), he nonetheless found that respondent's offense was sufficiently severe to show that he lacked the qualifications to hold an airman certificate (Tr. 210) . Noting that the Board has affirmed revocation under section 61.15(a) even when the respondent's offense did not involve the use of an aircraft (Tr. 202) ,³ the law judge affirmed the order of revocation.

On appeal, respondent argues that the law judge should have granted his pre-trial motion to dismiss the complaint as stale, and that the facts of this case do not warrant revocation. Finally, he argues that any sanction he receives should be applied retroactively. The Administrator has filed a reply brief opposing the appeal.

³ The law judge cited Administrator v. Kolek, 5 NTSB 1437 (1986) , aff'd Kolek v. Engen, 869 F.2d 1281 (9th Cir. 1989), in which the Board and the court of appeals affirmed revocation of an airman's certificate pursuant to 61.15(a) even though there was no evidence that an aircraft was involved in the drug offense. In upholding the propriety of revocation in that case the court noted that 1) the regulation itself authorizes revocation; 2) under Board precedent, non-use of aircraft has not always resulted in suspension as opposed to revocation; and 3) the Board justified revocation in this case based on the severity of the respondent's offense.

1. Stale complaint. It is undisputed that the notice of proposed certificate action in this case was not sent to respondent until more than 15 months after the date of respondent's conviction on July 23, 1987. However, the law judge denied respondent's motion to dismiss the complaint under the Board's stale complaint rule, 49 C.F.R. 821.33,⁴ finding that, because the allegations in the complaint presented an issue of

⁴Section 821.33 provides, in pertinent part:

§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint.

* * *

(b) In those cases where the complaint alleges lack of qualification of the certificate holder:

(1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true. If not, the law judge shall proceed as in paragraph (a) of this section.

(2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he shall proceed to a hearing on the lack of qualification issue only, and he shall so inform the parties. The respondent shall be put on notice that he is to defend against lack of qualification and not merely against a proposed remedial sanction.

lack of qualification, the six-month notice requirement of that rule did not apply. (Tr. 16-7.)

Respondent contends that the law judge misapplied the lack-of-qualification exception to the stale complaint rule (embodied in 49 C.F.R. 821.33(b)) because the complaint did not expressly allege a lack of qualification, in respondent's view a threshold requirement of that subsection. He further disputes the law judge's determination that the substantive allegations in the complaint presented an issue of lack of qualification.

We cannot agree with respondent that the absence of language in the complaint expressly alleging a lack of qualification precluded the law judge from reaching the question of whether the substance of the complaint presented such an issue. The Board has made clear that a lack of qualification must be shown in order to support the sanction of revocations. Accordingly, a complaint which seeks revocation inherently alleges a lack of qualification. This is not to say that all complaints seeking revocation are automatically exempt from the stale complaint rule, as the rule further requires the law judge to "determine whether an issue of lack of qualification would be presented if

⁵ Administrator v. Salkind, 34 CAB 933, 937 (1961) (while complaint did not expressly allege a lack of qualification, the issue was raised by virtue of the fact that it sought revocation and examiner was thus obligated to determine, under CAB's stale complaint rule, whether an issue of lack of qualification would be presented if any of the allegations were assumed to be true); Administrator v. Niolet, 3 NTSB 2846, 2849-50 (1980) (determinative consideration in a revocation proceeding is whether respondent possesses the care, judgment, and responsibility required of the holder of an airman certificate) .

any or all of the allegations, stale and timely, are assumed to be true." 49 C.F.R. 821.33(b)(1). See Administrator v. Hawes, NTSB Order No. EA-3830 (1993) (complaint seeking revocation was properly dismissed as stale where allegations did not raise legitimate issue of lack of qualification) .

Respondent claims this case is similar to Administrator v. Rothbart and Voorhees, NTSB Order No. EA-3052 (1990), where we agreed with the law judge that the Administrator had alleged a lack of qualification merely as a device to avoid dismissal, and upheld dismissal of the complaints as stale. That case involved a first officer and flight engineer who allegedly allowed the captain to operate a commercial aircraft when he was intoxicated. Respondent asserts in his brief that this case is similar to Rothbart in that the Administrator was aware of the incident which gave rise to the complaint (in this case the conviction) shortly after it occurred, and of the fact that respondent continued to operate as a professional pilot after that event. However, even if we accept these assertions as true,⁶ we note that in Rothbart we found reason to question the legitimacy of the Administrator's position that the respondents lacked qualification,⁷ a factor not present in this case. Given the

⁶There is no testimony or evidence in the record on these points.

⁷We stated that we were "particularly influenced by the fact that the Administrator ordered only a suspension, and made no allegation of a lack of qualification, with respect to [the captain] even though his offense (operating an air carrier flight as pilot-in-command while under the influence of alcohol) was more serious." Rothbart at 6.

Administrator's authority under section 61.15(a) to revoke pilot certificates based on drug convictions such as respondent's, and the existence of Board precedent upholding revocation in some cases involving drug convictions,⁸ the law judge correctly concluded that the complaint in this case presented a legitimate issue of lack of qualification.

2. Propriety of revocation in this case. Respondent argues that, although Board precedent justifies revocation when the operation of an aircraft is involved,⁹ only a suspension is warranted in this case because there was no showing that he was involved with the operation of an aircraft in connection with his drug offense. He cites several cases in which lengthy suspensions were imposed for drug convictions when there was no aircraft involvement, or only remote use of the airman's certificate, in connection with the offense.¹⁰ While respondent acknowledges that revocation was upheld in Administrator v. Kolek, 5 NTSB 1437 (1986), aff'd Kolek v. Engen, 869 F.2d 1281 (9th Cir. 1989), a case where there was no involvement of aircraft, he asserts that his offense "does not approach the

⁸ See Administrator v. Kolek, 5 NTSB 1437, aff'd Kolek v. Engen, F.2d 1281; Administrator v. Pekarcik, 3 NTSB 2903 (1980) .

⁹ See Administrator v. Hernandez, NTSB Order No. EA-3821 (1993) ; Administrator v. Pekarcik, 3 NTSB 2903 (1980) .

¹⁰ Respondent cites Administrator v. Freeze, 3 NTSB 1794 (1979) ; Administrator v. Rahm, 2 NTSB 988 (1974); and Administrator v. Ballan, 2 NTSB 1136 (1974).

'egregious' nature of Kolek's offense." (App. Br. at 15.)¹¹. Specifically, respondent denies that he was a "major participant" in the drug-smuggling operation which formed the basis for his conviction, as found by the law judge. (Tr. 210.)

Our precedent supports revocation for violations of section 61.15(a) which are based on convictions of serious drug offenses such as respondent's, even if there is no involvement of an aircraft in the offense. Administrator v. Kolek, 5 NTSB 1437 (continuing criminal enterprise); Administrator v. Correa, NTSB Order No. EA-3815 (1993) (conspiracy to distribute and possess with intent to distribute cocaine, and possession with intent to distribute cocaine); Administrator v. Beahm, NTSB Order No. EA-3769 (1993) (possession with intent to distribute cocaine -- although there was a showing that an aircraft was involved in that case, we indicated we would have upheld revocation even if an aircraft had not been involved, in light of the seriousness of the offense).¹²

We agree with the law judge that, despite the

¹¹ We described the respondent in Kolek, who pleaded guilty to participating in a continuing criminal enterprise, as "the head of a large-scale drug trafficking organization that secured and illegally distributed controlled substances throughout the world." Kolek at 5 NTSB 1439.

¹² Contrary to respondent's position on appeal, this case is not analogous to Administrator v. Freeze, 3 NTSB 1794 (1979), where we affirmed an eight-month suspension based on a conviction of conspiracy to import marijuana. Whereas respondent's offense involved a very large quantity of illegal drugs intended for distribution, and was serious enough to warrant a substantial prison sentence, Freeze involved no charges relating to distribution of drugs, and, indeed, does not indicate that the respondent received any sentence at all for his offense.

non-involvement of an aircraft, respondent's offense in this case was severe, and indicates a lack of qualification to hold an airman certificate. The record reveals that respondent was convicted of conspiracy to possess with intent to distribute, and conspiracy to import, approximately 700 pounds of cocaine.

(Exhibits A-2, A-3, A-4.) The drug-smuggling flight on August 3, 1983, from Columbia to Montgomery, Alabama, which formed the basis for respondent's conviction, was part of a larger operation which apparently involved the use of three aircraft; at least two "stash houses"; and several pilots, drivers and load vehicles to accomplish its goals. (Tr. 68-9.) The 700 pounds of cocaine which was smuggled on the August 3 flight alone had a wholesale value of ten million dollars, and a street value of 65 million dollars. (Tr. 83.) Although respondent essentially disavowed any involvement in the drug-smuggling scheme at the hearing, the law judge rejected his claims of innocence, a credibility determination we will not disturb. Administrator v. Smith, 5 NTSB 1560, 1563 (1986).¹³

Finally, we do not consider the factors cited by respondent (his violation-free record, and his asserted need for his certificate in order to earn an income) to be mitigating. These types of factors cannot be considered in mitigation of sanction

¹³ We note that respondent was sentenced to nine years imprisonment for each of the two counts of which he was convicted. (Exhibit A-3). Even though the sentences were ordered to run concurrently, the length of respondent's sentence nonetheless suggests a substantial involvement in the conspiracies of which he was convicted.

where the respondent has demonstrated that he lacks the requisite qualifications. Administrator v. Sexauer, 5 NTSB 2456, 2447 (1987) .

3. Retroactivity of sanction. Respondent asserts that he has several times attempted to arrange for surrender of his airman certificate during the pendency of his appeal, so that he could "serve" the one-year waiting period (within which an airman cannot apply to the Administrator for re-certification after his certificate has been revoked) while he was still incarcerated. He argues that he should have the right to waive the stay of the Administrator's order effected by his appeal to the Board (see 49 U.S.C. 1429(a)), and that any sanction we impose should be applied retroactively to December 4, 1990, when he first offered to surrender his certificate to the Administrator.¹⁴ The Administrator replies that respondent is entitled to no credit simply because he offered to surrender a certificate for which he had no use.

We do not believe this is a matter appropriate for our review, as the period of time an airman whose certificate has been revoked must wait before applying for recertification is within the Administrator's discretion.

¹⁴ Respondent was apparently scheduled to be released from prison in March 1992.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The revocation of respondent's airline transport pilot certificate shall commence 30 days after the service of this opinion and order.¹⁵

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁵ For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).